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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. ———.

EUNICE GRIMES, *Petitioner,*

v.

CAPITAL TRANSIT COMPANY, a Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Eunice Grimes, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, in the above entitled case, entered on the 24th day of November, 1947, reversing a decision of the District Court of the United States for the District of Columbia.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia has not as yet been officially reported, but appears in R. 87.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on November 24, 1947 (R. 92), and petition for rehearing was denied on December 19, 1947 (R. 93).

The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended, Title 28 U. S. C. A., Section 347(a), and by virtue of an alleged violation of the VII Amendment to the Constitution of the United States.

Question Involved.

The evidence, as shown by the record, was sufficient to require the trial court to submit the case to the jury under the doctrine of last clear chance.

Statute Involved.

The VII Amendment to the Constitution of the United States.

Summary and Short Statement of the Matter Involved.

This is a suit by petitioner to recover for personal injuries suffered by her when struck by respondent's street car. The case was submitted to a jury in the District Court of the United States for the District of Columbia to determine whether respondent's motorman was negligent in operating the street car, whether petitioner was contributorily negligent and, if so, whether petitioner was entitled to recover under the doctrine of last clear chance. The jury found for petitioner in the sum of $6,500.00. The District Court overruled a motion for a directed verdict at the close of all the testimony, and, after verdict, overruled motions for a new trial and for judgment notwithstanding the verdict. The respondent appealed to the United States Court of Appeals for the District of Columbia, and two of the three Judges who decided the case in that court held that

the District Court judge erred in submitting the case to the jury on the doctrine of last clear chance. In so holding, the majority of the appellate court reexamined the evidence, accepted the evidence most favorable to respondent, and rejected the evidence favorable to the petitioner and the reasonable inferences to be drawn therefrom. Thus, the two Justices of the Court of Appeals, without having seen or heard the witnesses, substituted their opinions as to the weight to be given the testimony for the opinion of the jury.

Referring to the action of the majority of the court, Justice Edgerton, who wrote the dissenting opinion in this case said:

> "The Supreme Court has repeatedly reversed appellate courts that overturned jury verdicts supported by evidence as this Court is doing in this case . . . This court's disregard of these principles in the present case goes to the authority of the Supreme Court as well as the integrity of the jury system."

Under the common law, the weight to be given the testimony of witnesses is the exclusive province of the jury, and the decisions of this Court so hold. Also, by the VII Amendment to the Constitution, litigants in federal courts are guaranteed trial by jury of the facts in dispute.

The VII Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

Petitioner is therefore seeking protection in this Court and brings this Petition for Writ of Certiorari.

The petitioner filed her complaint (R. 2) against respondent in the federal District Court of the United States for the District of Columbia.

According to petitioner's testimony (R. 8), on the morning of January 9, 1945, about 8:30 a. m., petitioner was riding on a westbound street car along Pennsylvania Avenue, N. W., Washington, D. C. The car reached 12th Street, N. W., and she alighted on a raised wooden platform which ran along and near the westbound tracks immediately in front of the Raleigh Hotel. The west end of the platform extended within a foot or two of the east pedestrian crosswalk across Pennsylvania Avenue. She intended to cross Pennsylvania Avenue towards the south and board a bus at the terminal in front of the old Post Office building located on the south side of Pennsylvania Avenue and a little to the east. (R. 8). When she alighted from the street car she looked at the traffic light on the northwest corner of the intersection and saw it was green and that traffic was moving east and west on Pennsylvania Avenue. The car she was on moved off into the intersection shortly after she got off and while she was waiting on the platform. (R. 13). After this westbound street car had passed into the intersection and while she stood on the west end of the platform waiting for the light to change, she looked to the west and had a clear view of the policeman directing traffic in the intersection, unobstructed by the westbound street car. (R. 16). She saw him standing near the south side of the westbound tracks, somewhat east of the center of the intersection, near the safety zone. She also saw the car that later struck her, standing at a loading platform on the southwest side of Pennsylvania Avenue, loading and unloading passengers. Then she saw the light for Pennsylvania Avenue turn green-amber, waited awhile, heard the police officer blow his whistle (R. 17) indicating that the north-south traffic was to proceed. After the policeman blew his whistle for north-south traffic to proceed on 12th Street, she stepped off the end of the wooden platform into the east crosswalk and proceeded to cross Pennsylvania Avenue in a southerly direction. She walked in the crosswalk at her usual walking gait (which she estimated to be 3½ miles per hour, the equivalent of 5 feet a second). In

this manner she crossed the westbound track and reached the center of the eastbound track (after walking a distance of about 20 feet). As she walked she was looking over towards the bus terminal on the south side of Pennsylvania Avenue (which was in front of her and to her left). Suddenly, to her right, she heard the clanging of a bell (R. 9), she looked and saw a street car bearing down upon her, about to hit her. In an effort to avoid being struck, she ran to her left away from the car and to the south, across the track (R. 18). In this effort she ran from the center of the crosswalk a few feet out of the crosswalk, and although she succeeded in getting across the eastbound track she was struck in the back by a projecting ridge on the right front side of the street car, and fell about four feet east of the crosswalk and seven feet south of the track (R. 32). Her back was broken. Actual measurements showed the street car came to a stop 30 feet east of the crosswalk (R. 32); and that upon application of the brakes this car could be stopped in 17 feet at 10 miles per hour (R. 35).

There was some conflict in the evidence as to whether the eastbound street car that struck petitioner had entered the intersection on a green light, a green-amber light, or on a red light. But there was little if any doubt that at the time it struck petitioner, the light was red for Pennsylvania Avenue traffic and that petitioner was crossing on a green light. In fact, the testimony of the disinterested eyewitness, Emma Bayless, indicated that the red light for Pennsylvania Avenue traffic had been on long enough for her to have walked from the south side of Pennsylvania Avenue almost to the safety zone south of the eastbound track, a distance of from 30 to 40 feet, before the accident occurred. (The amber light stayed on only 5 seconds).

There was also conflict in the evidence as to whether respondent's motorman on the eastbound street car, which struck petitioner, had a clear view of petitioner for a sufficient time before the accident to have avoided it. On this point the only testimony that the view was obstructed came from the motorman who said that the westbound car from

which petitioner alighted had obstructed his view of petitioner and that he did not see her until she was about 10 feet away on the south rail of the westbound track.

Petitioner had testified that this car had moved off into the intersection *after* she alighted on the platform and that it had been gone quite some time (R. 13) before she left the platform and started to walk south across Pennsylvania Avenue. After it left she had a clear view across the tracks so that she saw the policeman directing traffic standing on the south side of the eastbound track near the middle of the intersection, and saw the car that struck her, loading at the opposite side of the intersection. Miss Bayless, the disinterested eye-witness, said that as she walked north across Pennsylvania Avenue, on the same crosswalk used by petitioner, her view was not obstructed (R. 48). According to the Traffic Policeman's testimony the east and westbound cars had begun to pass one another about the middle of the intersection (or 4 to 6 feet west of it) (R. 29-30). This would fix the point at which the two cars began to pass about 65 feet from where petitioner was struck. By calculating the time the eastbound car would have taken (with both cars going at ten miles per hour) for the rear of the westbound car to have passed the front of the eastbound car, completely clearing the motorman's line of vision to petitioner (1½ seconds since each car was 44 feet long and they would pass one another going in opposite directions at 10 miles per hour at the rate of 29⅓ feet per second), and considering the fact that in 1½ seconds the front of the eastbound car which struck the plaintiff would still have been 43 feet away from the point of impact (since the car was moving forward 14.67 feet per second at ten miles per hour, or 22 feet in 1½ seconds) it becomes apparent that the motorman would have had an unobstructed view of petitioner soon enough to have avoided the accident. (The testimony shows that the car which struck the plaintiff could be stopped in 17 feet (R. 35), and allowing .6 second for reaction time (at 10 miles per hour the car would cover 8 feet in this time) the motorman should have only needed to

see petitioner about 25 feet away. Furthermore, the respondent's street car by actual measurements traveled 26 feet beyond the point of impact.

At the conclusion of the evidence the case was submitted to the jury by the Trial Court, first to determine whether or not the transit company was negligent in the operation of its street car, and secondly, the jurors were told that if they found this to be the case, they were then to examine the evidence and determine whether or not petitioner was contributorily negligent, and if they found she was, she could not recover unless respondent had a later chance to avoid the accident after it became *or should have become* apparent that petitioner was in a position of peril. (The Appellate Court does not question that petitioner was in as perilious position and obviously unaware of her danger). It will be seen therefore that there was abundant evidence to have submitted the case to the jury on the last clear chance. Under the common law and under the VII Amendment to the Constitution, the appellate court should have viewed this evidence most favorably to petitioner, giving her every legitimate inference that might be drawn therefrom to support her judgment on the verdict.

Instead of doing this, two members of the appellate court reexamined the evidence, weighed it just as it was the province of the jury to do, determined that the motorman's view of petitioner had been obstructed by the westbound street car until too late to have avoided the accident. Then on this finding held that the able trial judge should not have submitted the case to the jury on the doctrine of the last clear chance. (The majority of the court also found as a fact that the eastbound street car entered the intersection on a green light. There was conflicting evidence on this point also).

Arthur G. Lambert,
George L. Hart, Jr.,
Counsel for Petitioner,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Whether or not the evidence justified submitting the case to the jury on the doctrine of the last clear chance depended on whether respondent's motorman had a clear view of petitioner soon enough to have avoided striking her. He had such a view unless the street car from which petitioner alighted obstructed his view. From the evidence given by the policeman directing traffic at the intersection at the time of the accident, it can be demonstrated that the motorman should have seen petitioner in ample time to have avoided the accident. Petitioner's own testimony was to the same effect.

The evidence which petitioner gave bearing upon this point is as follows (R. 12, 13):

> "Q. You got off the street car that stopped at that loading platform, I think you testified?
> A. Yes, I did.
> Q. Was that street car still at the loading platform when you started to cross or had it gone on?
> A. The street car I had got off had gone on.
> Q. How long before the light changed had it gone?
> A. I don't recall that.
> Q. Do you know whether it had cleared or almost cleared the intersection?
> A. No, I do not.
> Q. Was there any other car at the loading platform by that time?
> A. Yes, there was.
> Q. Another car had taken it place?
> A. Yes, it had.
> Q. Can you give us some idea about how much time elapsed after the car you got off of left the loading platform and before you started to walk?
> A. I stood there for a few minutes. It seemed like an awful long time. It was about three minutes.
> Q. You say you stood there a few minutes and it seemed quite some time?
> A. Yes.

Q. On the loading platform?
A. Yes."

* * * * * * * * *

"Q. When was it you looked over and saw the light on the northwest corner there?
A. As soon as I got off of the street car." (R. 15)

* * * * * * * * *

Q. Was that light still green when the street car from which you had alighted moved off into the intersection?
A. Yes—yes, it was." (R. 15)

* * * * * * * * *

"Q. Did you see the policeman that you spoke of in the intersection?
A. I saw him, yes, standing as I stood there on the platform." (R. 16)

* * * * * * * * *

"Q. Was that before the street car moved away, the one you had alighted from?
A. That was afterward." (R. 16)

* * * * * * * * *

(R. 17)
"Q. Can you tell us where the rear end of the car from which you had got off was at the time you stepped off the platform?
A. As far as I know it had cleared the intersection.
Q. Did you have a view to your right, westward, along the car tracks, at the time you stepped off the platform?
A. I did before I stepped off.
Q. Did you look to see whether there were any cars coming?
A. Yes.
Q. Was anything obstructing your view at that time?
A. No; only I saw passengers boarding the street car going east.
Q. Did you see any street cars in the intersection at that time?
A. No.
Q. If there was an eastbound street car in the intersection at that time could you have seen it?
A. What do you mean?

Q. If there had been an eastbound street car crossing 12th Street at the time you stepped down from the platform would you have been able to see it in your position?

A. Sure."

* * * * * * * * *

(R. 20)

"Q. I want to ask you, did any other street car going west leave the platform on which you alighted except the one that you alighted from?

A. No.

Q. That was the only street car that left there and proceeded westward?

A. Yes.

Q. Another car I think you said drew up there and was unloading. That did not proceed westward until after you had passed in front of it. Is that right?

A. That is right."

Petitioner, standing on the west end of the loading platform at the northeast corner of the intersection, after the car she had been on moved away, had a clear view of the policeman standing just south of the eastbound tracks between the center of 12th Street and the east safety zone, and she had an unobstructed view of the eastbound street car that struck her loading on the southwest side of the intersection, it follows then that the motorman of the eastbound street car had a clear view of the petitioner and that his view of her was not obstructed by the westbound car from which she alighted. (It will be remembered that petitioner testified that the ony westbound street car that entered the intersection after she alighted was the car she had been on).

The testimony of Policeman Brennan is as follows (R. 26):

"Q. Did you see a westbound street car enter the intersection at about the same time as the eastbound car entered it?

A. Yes.

Q. Did those two cars pass each other in the intersection?

A. Yes, sir.

Q. Where with reference to the place that you were standing did the front of the two cars commence to pass each other?

A. Approximately in the middle of the street.

Q. Approximately in the middle of 12th Street?

A. Yes."

* * * * * * * * *

(R. 29, 30)

"Q. Did the car that was going west, did that clear this intersection before this traffic signal went red against it?

A. The car going west?

Q. The car going west, the one toward the Treasury, that you were asked about the first time on cross-examination.

A. As far as I can remember it just crossed practically in the same manner the other car crossed. Soon after it got into the intersection the light changed against that, and so on, the same manner as it turned against the eastbound car.

Q. How far had that car gotten into the intersection before the light changed to amber? We are now talking about, not the car that struck the plaintiff but the car that went through the intersection therein the opposite direction.

A. As I can remember it started across in the same manner on the green and then the other light changed after it got in the intersection a little ways.

Q. Can you tell us how far it got in the intersection at the time the light switched to amber?

A. So far as I can remember it was just a little bit ahead of the other car.

Q. It was ahead of the other car?

A. Just a little bit.

Q. How much, would you say?

A. No more than four or five or six feet ahead of the other one."

* * * * * * * * *

"Q. Was it going approximately the same speed as the other car?

A. Yes, it was." (R. 30)

Since from curb to curb the width of 12th Street was 70 feet (R. 33) and the cars met about the middle of 12th

Street (or from 4 to 6 feet west of the middle), the eastbound car had to travel one-half the width of 12th Street or 35 feet plus 6 feet or 41 feet before reaching the east cross walk. The crosswalk was 20 feet wide (R. 33), and petitioner was struck about 4 feet east of the crosswalk. It would follow from the officer's testimony that the front of the eastbound street car was then 41 feet plus 20 feet plus 4 feet or 65 feet from the point petitioner was struck when it began to pass the westbound car. If both cars were going at about 10 miles per hour, they would have passed one another at the rate of 29⅓ feet per second. Since each car was 44 feet long it would have required 1½ seconds for the front of the eastbound car to have passed the rear of the westbound car and then the motorman would have had a clear view of petitioner to his left. Since the eastbound car going at 10 miles per hour would have covered 22 feet in the 1½ seconds it took the cars to pass, it would have been 42 feet away from the point of impact when the view of petitioner became clear. Respondent's street car (heavily loaded) could be brought to a stop in about 17 feet going at 10 miles per hour (R. 36). Allowing for reaction time which would not be more than 6/10ths of a second, there would have been ample time for respondent's motorman to have stopped his street car if he had been looking. (During the 6/10ths of a second reaction time the car would have moved forward 8 to 9 feet, going at the rate of 14.67 feet per second. Add to this the 17 feet stopping distance after brakes are applied, and we have 25 to 26 feet. If the motorman could have seen petitioner at this distance he should have avoided the accident).

Even the motorman conceded that his car commenced to pass the westbound car just east of the center of the intersection. His testimony on this point follows (R. 58):

> "Q. Where was it that the front of your car came opposite the front of the car coming in the opposite direction?
>
> A. It was the east side of the center of the intersection.

Q. Can you give us some idea on this chart?
A. Here (indicating).
Q. You have pointed to a point just beyond what you have indicated as the center of the intersection.
A. Yes.
Q. Toward the east?
A. Yes.
Q. At that time was that car moving faster or slower or about the same speed?
A. It seemed to be going a little bit slower." (R. 58)

* * * * * * * * *

"Q. You passed the front end at the middle of the intersection?
A. Yes." (R. 67)

A calculation similar to the one made above on the policeman's testimony will show that the motorman saw or should have seen the plaintiff in adequate time to have avoided the accident. (He would have had a clear view of petitioner about 37 ft. from her.) Thus, it will be seen that the only testimony in the case that the motorman's view was obstructed was from the motorman himself, which he contradicted by admitting that the cars passed in about the center of the intersection at 10 miles per hr. Furthermore the motorman had made varying statements to the police on these same matters.

In view of the evidence submitted, it must be conceded that the United States Court of Appeals for the District of Columbia did not discharge the appellate function envisioned by the Seventh Amendment to the Constitution of the United States, wherein it is said:

> "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law."

The provisions of the Seventh Amendment securing the right of trial by jury have been held by this Court to be applicable to the courts of the District of Columbia.

Capital Transit Co. v. *Hof, 174 U.S. 5*

While in many states of the Union the appellate courts have the right to review the facts as well as the law in all appeals, as if they were proceedings in equity, that power has been expressly denied the courts of the United States by this Amendment.

Barbour v. *Moore, 10 App. D.C. 30, 50.*

But even if the petitioner were not entitled to the protection of the Seventh Amendment, the action of the appellate court in this case would be in conflict with the decisions of this Court.

The case of *Lavender* v. *Kurn, 327 U.S. 645* is a case in point. In that case an employee of a railroad had been killed, and his personal representative brought suit against the railroad under the Railroad Employers' Liability Act. Plaintiff obtained a verdict in the trial court, and the case was appealed. The appellate court held that there was insufficient evidence for the case to have been submitted to the jury. The case was taken on a Writ of Certiorari by this Court, and this Court said page 653)

> "... Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The still later case of *Ellis* v. *Union Pacific Railroad Co., 329 U.S. 649, 653,* decided in 1946, is also clearly in point.

Justice Edgerton in his dissenting opinion in our case said referring to the Ellis case.

> "In a recent case of this sort the Supreme Court said: 'The choice of conflicting versions of the way the ac-

> cident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury . . . Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable . . . And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury."

It would be difficult to find a case in which it was more apparent that the province of the jury had been invaded; or one in which the Appellate Court failed more completely to construe the evidence most favorably to the petitioner (after a jury had found in her favor) and to give her every reasonable inference to be drawn therefrom. In fact the evidence in this case on the question involved preponderates in favor of petitioner. The testimony of the traffic policeman, the petitioner and the independent eye-witness, Emma Bayless, all show that the motorman's vision was not obstructed by the westbound street car. Even parts of the motorman's testimony support this too. The framers of our Constitution saw fit to guarantee the right of trial by jury to individuals when litigating before the Federal Courts. Unless this Court takes jurisdiction petitioner is without a remedy to enforce her constitutional right.

CONCLUSION.

For these reasons it is respectfully submitted that the action of the United States Court of Appeals for the District of Columbia is in violation of the Seventh Amendment to the Constitution of the United States and is inconflict with decisions of this Court.

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Counsel for Petitioner